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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 MEREDITH JIMISON,

12 Plaintiff,

13 v.

14 AMERICAN GENERAL LIFE
15 INSURANCE COMPANY,

16 Defendant.

Case No.: 15cv01620 JAH - NLS

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS [Doc. No. 25]**

17 **INTRODUCTION**

18 Plaintiff originally filed an action in Superior Court on June 24, 2015, naming
19 American General Life Insurance Company (“AGL”) and Does 1 through 100 inclusive as
20 defendants. See Complaint (Doc. No. 1-3). Defendant removed the action to federal court
21 on July 28, 2015. Shortly thereafter, Defendant filed a motion to dismiss the complaint.
22 See Doc. No. 7. This Court granted the motion and provided Plaintiff the opportunity to
23 file an amended complaint. See Doc. No. 21. Plaintiff filed a First Amendment Complaint
24 (“FAC”) on October 21, 2016, asserting claims for violation of California Business and
25 Professions Code section 17200 *et. seq.*, breach of the covenant of good faith and fair
26 dealing, and breach of contractual duty to pay a covered claim. Plaintiff alleges Defendant
27 uses the Social Security Death Master File (“DMF”), which reports the deaths of American
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1 citizens, to withhold death benefit payments. FAC ¶ 1. Plaintiff further alleges Defendant
2 used the DMF to cut off lifetime payments to annuitants and beneficiaries under its annuity
3 policies, and, at the same time, failed and refused to pay death benefits to beneficiaries
4 based on deaths reported in the DMF. Id. He further alleges, following an investigation
5 by state regulators, Defendant agreed to identify deceased insureds through the DMF and
6 make payments to beneficiaries. Id. ¶¶ 2, 17. Plaintiff asserts he was a beneficiary on an
7 AGL policy insuring the life of his father. Id. ¶ 21. He alleges, 7 years after his father's
8 death, he received a letter from AGL requesting he complete a statement and send a copy
9 of the death certificate to receive policy benefits, and he complied. Id. ¶¶ 23, 24. Later,
10 he alleges, he received a check for \$1,072.25, which comprised of a \$1,000 death benefit
11 and \$72.25 in interest. Id. ¶ 25. He asserts Defendant underpaid the proceeds under
12 California law and the policy.

13 Defendant filed a motion seeking dismissal of the FAC pursuant to Rule 12(B)(6) of
14 the Federal Rules of Civil Procedure along with a request for judicial notice. See Doc. Nos.
15 25, 25-4. Plaintiff filed an opposition and an objection to Defendant's request for judicial
16 notice. See Doc. Nos. 29, 30. Defendant filed a reply in support of the motion to dismiss
17 and a reply in support of its request for judicial notice. See Doc. Nos. 32, 33. Finding the
18 matter suitable for determination without oral argument, the Court vacated the hearing date
19 pursuant to Local Rule 7.1.

20 After a review of the parties' submissions and for the reasons discussed below, the
21 Court GRANTS Defendant's motion to dismiss.

22 **LEGAL STANDARD**

23 Rule 12(b)(6) tests the sufficiency of the complaint. Navarro v. Block, 250 F.3d
24 729, 732 (9th Cir. 2001). Dismissal is warranted under Rule 12(b)(6) where the complaint
25 lacks a cognizable legal theory. Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530,
26 534 (9th Cir. 1984); see Neitzke v. Williams, 490 U.S. 319, 326 (1989) ("Rule 12(b)(6)
27 authorizes a court to dismiss a claim on the basis of a dispositive issue of law.").
28 Alternatively, a complaint may be dismissed where it presents a cognizable legal theory

1 yet fails to plead essential facts under that theory. Robertson, 749 F.2d at 534. While a
2 plaintiff need not give “detailed factual allegations,” he must plead sufficient facts that, if
3 true, “raise a right to relief above the speculative level.” Bell Atlantic Corp. v. Twombly,
4 550 U.S. 544, 545 (2007).

5 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,
6 accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal,
7 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 547). A claim is facially
8 plausible when the factual allegations permit “the court to draw the reasonable inference
9 that the defendant is liable for the misconduct alleged.” Id. In other words, “the non-
10 conclusory ‘factual content,’ and reasonable inferences from that content, must be
11 plausibly suggestive of a claim entitling the plaintiff to relief. Moss v. U.S. Secret Service,
12 572 F.3d 962, 969 (9th Cir. 2009). “Determining whether a complaint states a plausible
13 claim for relief will ... be a context-specific task that requires the reviewing court to draw
14 on its judicial experience and common sense.” Iqbal, 556 U.S. at 679.

15 In reviewing a motion to dismiss under Rule 12(b)(6), the court must assume the
16 truth of all factual allegations and must construe all inferences from them in the light most
17 favorable to the nonmoving party. Thompson v. Davis, 295 F.3d 890, 895 (9th Cir. 2002);
18 Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996). However, legal
19 conclusions need not be taken as true merely because they are cast in the form of factual
20 allegations. Ileto v. Glock, Inc., 349 F.3d 1191, 1200 (9th Cir. 2003); Western Mining
21 Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). When ruling on a motion to dismiss,
22 the Court may consider the facts alleged in the complaint, documents attached to the
23 complaint, documents relied upon but not attached to the complaint when authenticity is
24 not contested, and matters of which the Court takes judicial notice. Lee v. City of Los
25 Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001). If a court determines that a complaint fails
26 to state a claim, the court should grant leave to amend unless it determines that the pleading
27 could not possibly be cured by the allegation of other facts. See Doe v. United States, 58
28 F.3d 494, 497 (9th Cir. 1995).

JUDICIAL NOTICE

Defendant requests judicial notice of the legislative history of California Insurance Code section 10172.5, and “materials associated with determination of the beneficiary of the Meredith A. Jimison life insurance policy,” namely, the Jimison life insurance policy application, and correspondence from AGL regarding payment of the Jimison policy proceeds. See RJN at 1 (Doc. No. 25-4). Under Rule 201, this Court may take judicial notice of an adjudicative fact “not subject to reasonable dispute because it can be . . . accurately and readily determined from sources whose accuracy cannot be reasonably questioned.” See Fed. R. Evid. 201; Grason Elec. Co. v. Sacramento Mun. Util. Dist., 571 F. Supp. 1504, 1521 (E.D. Cal. 1983).

Plaintiff objects to the request to take judicial notice of “the materials associated with determination of the beneficiary of the Meredith A. Jimison life insurance policy,” specifically, exhibits B, D and E. He argues the materials lack proper authentication, are incomplete and unreliable.

I. Exhibit A

Defendant submits the legislative history of Section 10172.5 in Exhibit A of its request for judicial notice. Defendant contends the legislative history is relevant to its motion to dismiss and Plaintiff’s complaint. Plaintiff does not object to this request. The Court GRANTS Defendant’s request to take judicial notice of the legislative history.

II. Exhibit B

Defendant’s Exhibit B consists of an application for insurance purportedly filled out by the decedent Meredith A. Jimison. Defendant contends the FAC explicitly references and relies on the policy and, because allegations regarding the beneficiary listed on the policy are central to Plaintiff’s claims, the Court may take judicial notice.

Plaintiff disputes the authenticity of Defendant’s Exhibit B and maintains Defendant is repeating its request for judicial notice of the policy that this Court previously denied. He further maintains Defendant cannot say the materials in Exhibit B are true, correct and

1 complete copies of the policy. He also maintains Defendant altered the Specimen Policy
2 by adding additional information to make it appear to be the policy at issue in this matter.

3 In reply, Defendant argues because Plaintiff places the beneficiary designation at
4 issue and the authenticity of the document reflects the designation is not reasonably subject
5 to dispute, the Court may take judicial notice of Exhibit B. Defendant further argues the
6 Specimen Policy is not part of Exhibit B, and the objections are, therefore, misplaced.
7 Defendant maintains the document is authenticated by Ronalda Adcock, AGL's Director
8 of Life Claims.

9 While the Court may consider documents relied upon but not attached to the
10 complaint when the document's authenticity is not contested, there is no indication that
11 Plaintiff's FAC relies upon the application for insurance. Additionally, Plaintiff contests
12 its authenticity. Portions of Plaintiff's argument refers to additional documents not
13 contained in Exhibit B. However, he does dispute the authenticity of the application itself.
14 As such, the application is not proper to be considered pursuant to "incorporation by
15 reference," as asserted by Defendant.

16 Defendant attempts to authenticate the application through the declaration of
17 Ronalda Adcock, however, she is not a signatory of the document. The Court's reliance
18 on the Adcock declaration is improper to support judicial notice and would be more
19 appropriately considered in a motion for which the Court could consider extrinsic evidence.

20 Therefore, the Court SUSTAINS Plaintiff's objection to Exhibit B and DENIES the
21 request to take judicial notice of the application.

22 **III. Exhibit C**

23 Defendant seeks judicial notice of letters from Defendant to the insured's family
24 dated February 3, 2014, and March 5, 2014. Plaintiff does not object to the request to the
25 Court to take judicial notice of these letters.

26 The Court GRANTS Defendant's request for judicial notice of the letters attached
27 as Exhibit C.

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1 **IV. Exhibits D and E**

2 Defendant also seeks judicial notice of an email dated April 17, 2017 from Charlene
3 Nichols, Claims Analyst for AGL, to Plaintiff, labeled as Exhibit D. Exhibit E is a
4 certificate of death. Plaintiff argues Exhibits D and E are objectionable because they are
5 not referred to in the complaint and not central to Plaintiff's claims. Defendant argues
6 Exhibits D and E are essential to Plaintiff's allegations that he is the beneficiary of the
7 Jimison Policy.

8 Defendants seek to admit extrinsic evidence to dispute the allegations of the
9 complaint. This evidence is not proper for judicial notice. Accordingly, the Court
10 SUSTAINS Plaintiff's objections as to Exhibits D and E, and DENIES Defendant's request
11 for judicial notice of the documents and facts contained therein.

12 **DISCUSSION**

13 Defendant argues Plaintiff fails to allege facts to demonstrate Defendant failed or
14 refused to pay the death benefits owed Plaintiff within the meaning to section 10172.5 and
15 seeks dismissal of the FAC in its entirety.

16 **I. Section 10172.5**

17 Defendant maintains Plaintiff's action depends on the incorrect assumption that
18 Defendant was obligated to pay the proceeds of the life insurance policy as soon as the
19 insured died in 2007. Defendant argues Plaintiff's allegations ignore California law which
20 requires submission of claim documentation before there is an obligation to pay the policy
21 proceeds. Defendant contends it had no obligation to pay until claim documentation was
22 filed, and Plaintiff fails to allege he filed a claim prior to 2014.

23 Defendant maintains section 10172.5 does not apply where no claim has been made.
24 Specifically, Defendant maintains section 10172.5 provides that an insurer who fails or
25 refuses to pay the proceeds of any life insurance policy within 30 days after the date of
26 death of the insured shall pay interest from the date of the insured's death. Defendant
27 argues, "fails or refuses to pay" necessarily requires that insurers first have been provided
28 with notice of the claim and an opportunity to consider whether to pay the claim.

1 Defendant maintains the legislative history of section 10172.5 supports this conclusion, as
2 previously determined by this Court. Defendant contends Plaintiff makes no allegations
3 that any proceeds under the policy were payable prior to 2014, or that Defendant delayed
4 payment once the required documentation was submitted. Thus, Defendant argues,
5 Plaintiff fails to allege he is entitled to interest under section 10172.5. Defendant further
6 argues Plaintiff's allegations concerning Defendant's use of the DMF are not pertinent to
7 whether Defendant received a claim from Plaintiff, and failed or refused to pay a claim
8 within 30 days.

9 Plaintiff contends he states a claim for violation of section 10172.5. Plaintiff asserts
10 the FAC alleges Defendant had notice of the insured death, and he points to the allegations
11 that Defendant new or should have known of the insured's death through its use of the
12 DMF in support. Plaintiff maintains Defendant used the DMF to cut off lifetime payments
13 to annuitants and beneficiaries under its annuity policies but "turned a blind eye to the DMF
14 when it came to paying death payments due to life insurance beneficiaries." Opp. at 8.
15 Plaintiff contends the State of California and other insurance regulators launched an
16 investigation of Defendant, and as a result of the investigation, Defendant was required to
17 use the DMF to identify deceased insureds and make payments due their beneficiaries.
18 Upon its search, Defendant identified Plaintiff's father and notified Plaintiff on February
19 3, 2014. Despite this knowledge, Plaintiff argues, Defendant did not pay benefits until
20 Plaintiff submitted a claim statement. Plaintiff maintains the FAC contains facts plausibly
21 alleging that Defendant had notice death benefits were due to Plaintiff but failed to pay
22 those benefits within 30 days of the date of death, and Defendant failed to pay interest at
23 the rate required by section 10172.5. He cites to Burton v. Prudential Ins. Co., 669
24 Fed.Appx. 829 (9th Cir. 2016), in support. He further argues Defendant's interpretation of
25 section 10172.5 is inconsistent with section 10172.5, the terms of the policy and
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1 Defendant's act of paying Plaintiff one percent interest from the date of the insured's
2 death.¹

3 In reply, Defendant argues Plaintiff fails to state any cognizable claim to interest
4 under section 10172.5. Defendant contends Plaintiff mistakenly believes this Court
5 determined that interest is due from the date of death when the insurer fails or refuses to
6 pay death benefits after it receives some type of notice or request. Defendant argues this
7 Court's order demonstrates "notice" requires notice of a claim not merely notice of the
8 insured's death, which Defendant contends, is in line with settled law that insurers have no
9 duty to pay insurance proceeds before a claim is made. Because Plaintiff fails to allege
10 Defendant failed to pay benefits within 30 days of receiving a claim or notice of a claim,
11 Defendant argues Plaintiff fails to state a claim for interest under section 10172.5.

12 Defendant further argues Plaintiff's reliance on Defendant's use of the DMF does
13 not save the FAC, because mere notice of death is not what triggers the obligations to pay
14 benefits.

15 Additionally, Defendant argues the legislative history supports this Court's
16 interpretation that the purpose of Section 10172.5 is to penalize insurers who delay paying
17 claims and not intended to penalize insurers who have yet to pay proceeds on deaths for
18 which no claim is made, and Plaintiff points to no new facts or law to support his position
19 or refute the Court's interpretation. Defendant also contends Plaintiff reliance on Burton,
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22 ¹ Plaintiff also argues his position remains that Defendant is required to pay interest at the
23 statutory rate required by section 10172.5 regardless of when it learned or had notice of
24 the insured's death. In support, Plaintiff points to the legislative history which states that
25 30 days from the date of death constitutes a reasonable period of time for payment of
26 benefits and that any policy paid after 30 days should pay interest from the date of death
27 because life insurance proceeds are intended for the beneficiaries, not the insurers. He
28 maintains the compensatory objective explains why the legislature specifically rejected
entreaties by insurance companies to include language in section 10172.5 that
beneficiaries should be required to make a claim to trigger the requirement to pay interest
on policy proceeds if the proceeds are not paid within 30 days after the date of death.
However, this argument was previously rejected by this Court.

1 is misplaced because Burton concerned calculation of the proper interest rate once a
2 determination has been made that section 10172.5 interest is due, and there is no
3 determination interest is due here.

4 Under California law, a court must “ascertain the intent of the Legislature so as to
5 effectuate the purpose of the law.” State Farm Mutual Automobile Insurance Co. v.
6 Garamendi, 32 Cal.4th 1029 (2004). “In determining such intent, a court must look first to
7 the words of the statute themselves, giving to the language its usual, ordinary import and
8 according significance, if possible, to every word, phrase and sentence in pursuance of the
9 legislative purpose.” Id. If the statutory language is ambiguous, a court may consider
10 extrinsic information, such as legislative history, the statute’s purpose and public
11 policy. People v. Arias, 45 Cal.4th 169, 177 (2008).

12 Section 10172.5(a) reads, in relevant part:

13 each insurer. . .that fails or refuses to pay the proceeds of, or payments under, any
14 policy of life insurance issued by it within 30 days after the date of death of the
15 insured shall pay interest, at a rate not less than the then current rate of interest on
16 death proceeds left on deposit with the insurer computed from the date of the
17 insured’s death, on any moneys payable and unpaid after the expiration of the 30-
day period.

18 In this Court’s prior order granting Defendant’s first motion to dismiss, the Court
19 looked to the language of the statute and determined it was ambiguous because the phrase
20 “fails or refuses to pay” indicates the receipt of notice or request but the statute does not
21 have express language requiring the beneficiary submit a claim.

22 Upon reviewing the legislative history, this Court determined the legislature sought
23 to penalize insurers who delayed in paying claims. The Court further determined that the
24 legislative history demonstrates that a claim must be made to the insurer who then fails or
25 refuses to pay on the claim in order to trigger the interest penalty.

26 Plaintiff suggests the Court previously held payment of benefits is required upon
27 notice of the insured’s death and argues Defendant’s failure to pay benefits within 30 days
28 of learning of the insured’s death triggered its obligation to pay interest under section

1 10172.5. Defendant argues the Court's previous order indicates the insurer must first
2 receive notice of a claim and be provided the opportunity to pay. Otherwise, Defendant
3 argues, an insurer will be responsible for interest on claims that were never made and before
4 the policy proceeds were even due, on deaths for which no claim is payable. As noted by
5 Defendant, requiring payment within 30 days of notice of death could lead to absurd results
6 wherein an insurer is paying benefits before policy proceeds are due or upon deaths subject
7 to policy exclusions.

8 Additionally, Plaintiff fails to present any authority to support its position that mere
9 notice of an insured's death rather than some claim made to the insurer triggers the insurer's
10 obligation to pay within 30 days. Contrary to Plaintiff's argument, Burton does not support
11 his position. Burton involved the proper interest rate required by section 10172.5. The
12 court did not make any determination as to when a beneficiary is entitled to interest under
13 section 10172.5, and expressly refused to consider the defendant's argument that the
14 plaintiff was not entitled to interest for the reason that it never failed or refused to pay,
15 because the argument was not properly raised before the district court. 669 Fed.Appx. at
16 830, n. 3.

17 However, this Court finds the discussion of the legislative history in Burton very
18 persuasive. The court found the history demonstrates the purpose of section 10172.5 is to
19 "provide a disincentive to a practice of some insurance companies of intentionally
20 withholding proceeds from beneficiaries." Id. at 830 (quoting Letter from Assemblyman
21 Alan Sieroty to Governor Edmund G. Brown, dated September 11, 1975). This further
22 supports this Court's previous finding that payment of interest under section 10172.5 is
23 required when an insurer fails or refuses to pay on a claim within 30 days of receiving the
24 claim or request for payment.

25 Plaintiff does not allege Defendant failed to pay the policy proceeds within 30 days
26 of receiving his claim. As such, Plaintiff fails to state a claim under section 10172.5.

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II. UCL Claim

Defendant argues Plaintiff's claim under the UCL fails because it is based upon Defendant's alleged violation of section 10172.5, and Plaintiff fails to allege Defendant violated section 10172.5, and Plaintiff fails to show that he has standing to obtain restitution or injunctive relief.

To the extent Plaintiff's claim is based on Defendant's violation of section 1017.25(a), Plaintiff fails to state a claim. As discussed below, Plaintiff also fails to allege standing to support a UCL claim.

The only types of relief available under the UCL are injunctive relief and restitution. See Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal.4th 163, 179 (1999).

A. Restitution

Defendant maintains Plaintiff does not allege that he seeks the return of money that was once in his possession, and Plaintiff did not have a vested interest in payment of interest on the death benefit to support a claim for restitution.

Plaintiff argues section 10172.5 acts to vest interest in beneficiaries whose death benefits are not paid within thirty days following the death of the insured. He relies on the Ninth Circuit's conclusion in Burton that the interest rate of section 10172.5 floats along with funds held on deposit and the insurance company is merely passing through at least a portion of the interest it has been earning on the fund over time. He maintains he alleges a vested interest because under California law a contract for life insurance benefits creates rights in the beneficiary which are immediately vested upon the death of the insured. He further maintains the Court's previous determination that he had no vested interest was based on the erroneous notion that section 10172.5 was meant only to punish willful misconduct not to compensate the beneficiary.

In reply, Defendant argues Burton does not characterize the statute as punitive or non-punitive, but merely clarifies the interest rate to be use when an insurer fails or refuses

1 to pay policy proceeds within 30 days. Defendant maintains Burton does not apply here
2 because no claim was submitted until 2014.

3 Restitution requires the return of money or property once in the possession of the
4 plaintiff or that in which he or she has a vested interest. Korea Supply Co. v. Lockheed
5 Martin Corp., 29 Cal.4th 1134, 1149 (2003).

6 In its previous order, the Court dismissed Plaintiff's UCL claim upon finding Plaintiff
7 has no vested interest in the interest available under section 10172.5 and cannot recover
8 the interest as restitution under the UCL. The Court determined section 10172.5 is
9 designed to punish insurers who fail to timely pay benefits. Plaintiff maintains the holding
10 of Burton demonstrates section 10172.5 vests interest in beneficiaries whose death benefits
11 are not paid within thirty days following the death of the insured. The Court is not
12 persuaded by Plaintiff's argument. As noted by Defendant, the court in Burton did not
13 address whether section 10172.5 was punitive or non-punitive in nature. The limited
14 holding of Burton determined the proper interest rate to be paid by an insurer pursuant to
15 section 10172.5, and that the plaintiff sufficiently alleged the defendant failed to pay the
16 required interest rate. In making these determinations, the court noted the clear purpose of
17 section 10172.5 was to provide a disincentive to the intentional withholding of proceeds
18 by insurers. The purpose of disincentivizing insurer's from delaying payments supports
19 this Court's finding that the statute is punitive. Accordingly, Plaintiff has no vested interest
20 and does not allege he seeks money once in his possession, and, thereby fails to state a
21 claim for restitution under the UCL.

22 **B. Injunctive Relief**

23 Defendant contends Plaintiff lacks Article III standing to seek injunctive relief because
24 he has no ongoing contractual relationship with Defendant. Defendant further contends
25 Plaintiff cannot establish irreparable harm to support injunctive relief because he will
26 receive adequate compensation through money damages if he prevails on his claim.

27 Plaintiff argues has statutory standing to seek injunctive relief under the UCL because
28 he suffered injury in fact and has lost money or property as a result of Defendant's unfair

1 competition. He also maintains he seeks injunctive relief for conduct to which he was and
2 continues to be subjected and Defendant has presented no evidence of its compliance with
3 section 10172.5 or cessation of the bad faith claims handling practices challenged by
4 Plaintiff.

5 In reply, Defendant argues injunctive relief is unavailable because any harm suffered
6 by Plaintiff can be compensated with money damages. Defendant maintains Plaintiff fails
7 to address this point.

8 Plaintiff cannot establish irreparable harm to support injunctive relief because he may
9 receive adequate compensation through money damages if he prevails on his
10 claim. See Colorado River Indian Tribes v. Town of Parker, 776 F.2d 846, 850 (9th Cir.
11 1985). Accordingly, Plaintiff fails to state a claim for violation of the UCL.

12 **III. Breach of Contract**

13 Defendant argues Plaintiff's claim for breach of contract fails because Plaintiff does
14 not allege any specific policy provision was breached by Defendant. Defendant maintains,
15 as alleged, the only possible basis for Plaintiff's contract claim is the alleged violation of
16 section 10172.5, which, alone, is insufficient to allege a breach of contract.

17 In opposition, Plaintiff argues he sufficiently alleges a violation of section 10172.5,
18 and, therefore, his breach of contract claim can no longer be dismissed as derivative.
19 Additionally, he argues Defendant has a contractual obligation to comply with section
20 10172.5, and he properly alleges a breach of contract in alleging Defendant failed to pay
21 the proper interest rate on its claim payments.

22 Defendant argues, in reply, Plaintiff's breach of contract claim fails because it
23 depends entirely on his erroneous interpretation of section 10172.5, specifically, on
24 Defendant's failure to pay interest according to section 10172.5.

25 To state a claim for breach of contract under California law, a plaintiff must allege
26 "(1) existence of the contract; (2) plaintiff's performance or excuse for non-performance;
27 (3) defendant's breach; and (4) damages to plaintiff as a result of the breach." CDF
28 Firefighters v. Maldonado, 158 Cal.App.4th 1226, 1239 (2008).

1 In the complaint, Plaintiff alleges Defendant owed contractual duties and obligations
2 to fully pay claims once Defendant determined that payment of the death benefit was due
3 and Defendant breached the policies by failing to pay death benefits within 30 days of the
4 date of the insured's death or, alternatively, by failing to pay death benefits within 30 days
5 of receipt of notice of the insured's death from the DMF and failing to pay the proper
6 interest rate on its claim payments, Plaintiff performed their obligations under the policy,
7 and he suffered damages as a result of Defendant's breach. Compl. ¶¶ 71 – 75. Plaintiff's
8 breach of contract claim, as alleged, is based entirely upon Defendant's failure to pay
9 interest according section 10172.5. Because Plaintiff does not allege Defendant failed to
10 pay interest under section 10172.5 after receiving a claim and failing to pay the claim
11 within 30 days, he fails to sufficiently allege a breach. As such, he fails to state a claim for
12 breach of contract.

13 **IV. Breach of the Implied Covenant of Good Faith and Fair Dealing**

14 Defendant argues Plaintiff's claim for breach of the implied covenant of good faith
15 and fair dealing fails because Plaintiff does not identify any express contractual provision
16 on which his claim is based, the claim is based upon improper speculation and Plaintiff
17 fails to demonstrate any compensable economic loss. Specifically, Defendant contends
18 Plaintiff's allegations in support of his claim boil down to an assertion that Plaintiff would
19 like discovery on the off-chance that he was underpaid and argues this is insufficient to
20 raise a right to relief above the speculative level. Defendant further contends Rule 8
21 prevents this type of fishing expedition.

22 Additionally, Defendant argues Plaintiff fails to allege any compensable economic
23 loss associated with his claim for breach of implied covenant and, therefore, fails to state a
24 claim. Defendant maintains Plaintiff's allegations in support of the claim are primarily
25 premised on Plaintiff's allegations as to section 10172.5, and argues the breach of the
26 implied covenant of good faith and fair dealing claim based upon a violation of 10172.5,
27 just as the claim brought for violation of section 10172.5, fails to state a claim. Defendant
28 also argues the remaining allegations in support of this claim pertain to the provision of

1 information to Plaintiff. However, Defendant argues, Plaintiff fails to plead any economic
2 loss in connection with the allegations.

3 Plaintiff maintains he states an actionable claim for breach of the implied covenant
4 of good faith and fair dealing in connection with his underpaid interest claims. He argues
5 because he alleges a violation of section 10172.5, his bad faith claim survives. Specifically,
6 Plaintiff contends Defendant breached Plaintiff's rights to receive all the fruits of the policy
7 by failing to comply with section 10172.5. Even assuming there is no express contractual
8 obligation to pay interest on unpaid benefits, Plaintiff argues, Defendant had a statutorily
9 incorporated implied obligation not to deprive the beneficiary of the benefits of the policy,
10 including payments under section 10172.5 and an implied obligation under the DMF
11 settlement. Plaintiff further argues the holding in Burton refutes Defendant's argument
12 that Plaintiff cannot state a claim by speculating that he may have been underpaid.

13 Plaintiff further maintains he states an actionable claim for bad faith in connection
14 with the payment mishandling claims. He contends he alleges Defendant acted in bad faith
15 in utilizing unreasonable and unwarranted tactics to pay less than what was due and
16 otherwise obscure information that might confirm or shed light on its underpayment.
17 Additionally, Plaintiff argues he alleges a number of economic damages stemming from
18 Defendants acts in contravention of its duty of good faith and fair dealing, including
19 withheld benefits, interest thereon, other general and special damages, attorney fees,
20 witness fees and costs of litigation reasonably necessary and incurred to recover the
21 policies' benefits. At a minimum, Plaintiff argues, he alleges the "runaround" Defendant
22 gave him forced him to retain counsel and ascertain his full rights and interests under the
23 policy.

24 In reply, Defendant argues, Plaintiff's claim for breach of the implied covenant of
25 good faith and fair dealing fails because it is not tied to any provision of the insurance
26 policy. Defendant further argues the bad faith claims for mishandling funds lacks a
27 plausible allegation of economic loss stemming from the alleged mishandling. Defendant
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1 argues Plaintiff's allegations of economic loss through general and special damages,
2 attorney fees, witness fees and costs of litigation are conclusory.

3 The covenant of good faith and fair dealing is implied to prevent a contracting party
4 from engaging in conduct which frustrates the other party's rights to the benefits of the
5 contract. Love v. Fire Ins. Exchange, 221 Cal.App.3d 1136, 1153 (1990). "The precise
6 nature and extent of the duty imposed by such an implied promise will depend on the
7 contractual purposes." Egan v. Mutual of Omaha Ins. Co., 24 Cal.3d 809, 818 (1979).

8 In support of his claim for breach of the covenant of good faith and fair dealing,
9 Plaintiff alleges Defendant breached the covenant by unreasonably and without proper
10 cause failing to search DMF records to obtain notice of its insureds' death(s); unreasonably
11 and without proper cause failing to pay death benefits within 30 days of the date of its
12 insureds' death(s); unreasonably and with without proper cause failing to pay death
13 benefits within 30 days of the date of receiving notice through the DMF of its insureds'
14 death(s); unreasonably and without proper cause failing to make full claim payments on
15 claims by paying interest at a rate untethered to the then-current rate at the time of the
16 insured's death; failing to provide adequate explanations of claim payments, as required
17 by California law; failing, upon request of claimants, to provide copies of the insurance
18 policies on which claims are paid, thereby preventing them from knowing a) if and when
19 policies may have converted to reduced-paid-up coverage and the amount of that coverage,
20 and b) whether claims may have been enhanced through riders providing additional
21 coverage; failing to provide, promptly, a reasonable explanation of the basis relied on in
22 the insurance policy, in relation to the facts of applicable law, for the offer of a settlement,
23 in violation of California Insurance Code section 790.03(h)(13); compelling claimants to
24 institute litigation to recover amounts due them, in violation of California Insurance Code
25 section 790.03(h)(6); unreasonably placing its financial interests ahead of those of its
26 policyholders and their beneficiaries; and unreasonably refusing to give at least as much
27 consideration to the interests of its policyholders and beneficiaries as it gives to its own
28 interests. FAC ¶ 77. He asserts, as a result of Defendant's conduct he and the class

1 members suffered damages including, withheld benefits, interest, and other general and
2 special damages in an amount to be shown at trial. Id. ¶ 85. He further alleges he and the
3 class members were compelled to retain legal counsel to obtain benefits due under their
4 policies as a result of Defendant's conduct. Id. ¶ 86.

5 To the extent Plaintiff asserts a claim based upon a violation of section 10172.5(a),
6 he fails to state a claim for breach of the covenant of good faith and fair dealing.
7 Additionally, Plaintiff fails to allege economic loss resulting from Defendant's alleged
8 mishandling of his claim. Accordingly, Plaintiff fails to sufficiently allege a claim for
9 breach of the covenant of good faith and fair dealing.

10 **V. Leave to Amend**

11 Defendant requests the Court dismiss the FAC with prejudice. Plaintiff requests an
12 opportunity to amend if the Court finds deficiencies in the FAC. In an abundance of
13 caution, the Court will provide Plaintiff another chance to amend his complaint to
14 sufficiently allege his claims.


15 **CONCLUSION AND ORDER**

16 Based on the foregoing, IT IS HEREBY ORDERED:

17 1. Defendant's motion to dismiss is **GRANTED**.

18 2. If Plaintiff wishes to amend the complaint to address the deficiencies noted
19 above, he may file a First Amended Complaint **on or before October 23, 2017**.

20 DATED: September 21, 2017

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22 JOHN A. HOUSTON
23 United States District Judge
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